MAYBAN FINANCE BHD

v.

TAN SAY CHOON

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-486-2001]
3 MARCH 2004

CIVIL PROCEDURE: *Pleadings - Defence - Failure to plead issue raised as defence during trial - Whether defendant ought to be allowed to raise such issue at trial*

SECURITIES: *Shares - Share mortgage facility - Power of bank to force-sell charged shares - Extent of power of sale - Conditions of sale*

BANKING: *Securities for advances - Share mortgage facility - Power of bank to force-sell charged shares - Extent of power of sale - Conditions of sale*

TORT: *Negligence - Banker and customer - Share mortgage facility - Bank's power to sell charged shares - Extent of power of sale - Conditions of sale*

The plaintiff extended to the defendant a share mortgage facility ('the facility') through a revolving credit facility agreement and memorandum of deposit dated 3 May 1999. The facility went into default. The defendant paid a sum of RM15,000 on 20 December 2000 and a further sum of RM15,000 on 26 January 2001. He thereafter made periodic payments until 23 May 2001. No further payment was made from that date. By notice of demand dated 2 July 2001 the plaintiff demanded the sum of RM896,488.20 – being the whole amount outstanding under the facility. Since the defendant did not pay, the plaintiff force-sold the charged shares. The defendant was informed of the force-selling by notices and was furnished with monthly statements. There was no record that the defendant protested against the forced selling. The plaintiff thereafter proceeded to claim the outstanding amount. In his defence, the defendant challenged the numerous notices and security documents. He further denied receiving any notice from the plaintiff. However at the trial, the defendant appeared only to rely on the following two grounds: (i) that the plaintiff's failure to sell his shares at an earlier date – in February 2001 – constituted negligence in that the defendant's indebtedness would have been reduced if the shares had been sold in February 2001; and (ii) the plaintiff had contravened the KLSE Rules relating to Member Companies.

Held (allowing the plaintiff's claim with costs on a party and party basis):

[1] The defendant's case was merely that he had not received the plaintiff's notices. Although the defendant had specified in evidence the relevant dates after which the plaintiff ought to have force-sold his shares, the plaintiff's alleged failure was not pleaded in his defence. It is trite law that a party is bound by his own pleadings. By failing to specifically plead such failure, the defendant ought not to be allowed to rely on such defence at trial. (pp 434 f-h, 435 a-b)

[2] It was apparent that the defendant did not know what the price of his shares was in February 2001. The defendant continued to make payment until 23 May 2001. The plaintiff only issued the notice of demand on 2 July 2001 and force-selling began on 13 July 2001. The court would accept the plaintiff's explanation why there was no question of selling the shares in February 2001. (p 435 d, g)

[3] The power of sale conferred on the plaintiff and expressly agreed to by the defendant gave the plaintiff wide powers to sell the shares as and when it saw fit to do so without being liable for losses should losses occur. The plaintiff could sell whenever it chose to do so, upon default, provided that when it did sell it had to obtain the true market value. In the instant case, the plaintiff sold the shares at market value. There was no evidence or allegation that the market value was not obtained at the time of the sale of the shares. There was therefore no breach of duty of care or negligence on the part of the plaintiff in selling the charged shares. (pp 437 a-b, 438 b, g-h)

[4] The KLSE Rules mentioned by the defendant were no longer in force. In any case the plaintiff was not bound by such rules. (p 439 b)

Case(s) referred to:

China and South Sea Bank Ltd v. Tan [1989] 3 All ER 839 PC ***(refd)***
Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd [1971] 2 All ER 633 ***(refd)***
Malayan Banking Berhad v. Lim Poh Ho & Anor [1997] 2 CLJ 516 HC ***(foll)***
Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd [1997] 3 CLJ 216 CA ***(refd)***

For the plaintiff - Cynthia Lee Bee Gaik; M/s Ban Eng, Anual & Foong
For the defendant - Anoop Singh Jagir Singh; M/s Anoop & See

Reported by Andrew Christopher Simon

JUDGMENT

RK Nathan J:

Facts

The plaintiff extended to the defendant a loan of RM1.0 million upon terms and conditions contained in a revolving credit facility agreement dated 3 May 1999. (the "RCF agreement") and a memorandum of deposit dated 3 May 1999 ("MOD"). The relevant terms of the RCF and MOD are as follows:

(a) interest is at 2.5% above plaintiff's BLR with daily rest;

(b) facility to be repayable on demand;

(c) interest to be paid monthly;

(d) penalty interest on arrears of payment at 1.0% per annum;

(e) facility subject to margin of advance or margin of finance ("MOF") of 50% the value or charged shares;

(f) Plaintiff entitled to vary agreed interest rate and/or the MOF;

(g) Defendant required to charge shares as security for the facility;

(h) Defendant to bear costs of enforcement of contract.

As security for the loan, the defendant charged approximately 897,000 of his shares in a company called Transcapital Holdings Berhad ("THB shares") and signed the MOD. It is to be noted that although the purpose of the facility was for investment in shares, this is not a share trading account but a loan secured by shares lodged with the plaintiff, sometimes known as a share mortgage facility.

A sum of RM942,100 was drawn down by the defendant. The agreed rate of 2.5% was not varied by the plaintiff. At the date of the RCF agreement the BLR was 9.0%. There were two changes of BLR, that is on 9 May 1999, the BLR was reduced to 8.5%, and on 15 August 1999, the BLR was further reduced to 7.95%, which was the BLR at the date of this claim. The changes in the BLR were notified to the defendant by publication of notices in the national newspapers. The defendant alleged in his defence that he had not received notice of variation of BLR and this was the basis upon which this court disallowed summary judgment but at the trial there was no challenge by the defendant on this issue.

On or around 3 October 2000, the facility was in default. By a letter dated 5 December 2000 the defendant applied to the plaintiff to repay his indebtedness under the facility by monthly payments of RM15,000 until the MOF reached 50%. The plaintiff agreed to allow the defendant to pay RM15,000 per month from 15 December 2000 provided the MOF was reduced to 75% and maintained at 75% during the re-schedulement period, and thereafter to reduce the MOF to 50%.

The defendant paid RM15,000 on 20 December 2000, and another RM15,000 on 26 January 2001. By a letter dated 8 February 2001, the plaintiff informed the defendant that it was agreeable to take 139 lots of the THB shares to reduce the MOF, and that force-selling of the charged shares would take place if the MOF reached 65%.

By a letter dated 15 February 2001 to the defendant, the plaintiff demanded a top-up of the account of RM404,768.34 by cash or RM622,720.52 by way of shares. On 21 February 2001, a sum of RM9,801.18 was credited to the defendant's account being 'Reversal on penalty MOF November to January 2001'. The defendant responded to the plaintiff's notice dated 15 February 2001 by paying RM5,000 into his account on 26 February 2001.

The defendant made further payments to his account. On 8 March 2001, the defendant paid RM10,000 and on 30 March 2001 the defendant paid another RM5,000. Another payment of RM5,000 was made on 23 May 2001. After 23 May 2001, there were no further payments on the loan by the defendant into his account up to the date of this claim. By notice of demand dated 2 July 2001, the plaintiff demanded the sum of RM896,488.20, that is the whole amount outstanding under the facility.

Since the defendant did not pay, force-selling of the charged THB shares took place. The defendant was informed of the force-selling by notices. There is no record that the defendant protested to the forced-selling. In any case the defendant was furnished with six monthly statements. By a certificate dated 31 August 2001, the plaintiff through its branch manager confirmed the amount claimed. The plaintiff is further relying on the conclusive evidence clause (cl. 19.05 of the MOD).

The Plaintiff's Claim

The plaintiff thus claimed:

(a) A sum of RM746,839.76;

(b) Interest at 2.5% per annum above the plaintiff's BLR where the BLR on 31 August 2001 was 7.95%, with daily rest from 1 September 2001 till full settlement and

(c) Costs on a solicitor/client basis.

Defence

By his defence dated 22 May 2002, the defendant denied the plaintiff's claim, challenged the letter of offer, the notice of demand, all the security documents and denied receipt of any notices or notification by the plaintiff. However, at the trial much of the plaintiff's evidence was not challenged. It was evident that the defendant was only relying on two grounds. The first ground was that had the plaintiff sold all the charged sharcis in February 2001, when the price was RM0.845 each, the indebtedness of the plaintiff would have been reduced. The defendant contended that failure of the plaintiff to do so constituted a breach of a duty of care amounting to negligence and that as a result, he had suffered loss. The second ground is that the plaintiff has contravened the rules relating to member companies.

Findings Of The Court

1st Issue:

The defendant's evidence was that the plaintiff issued a notice dated 8 February 2001 and that the last payment of installment of RM15,000 was made on 26 January 2001. Upon the defendant's default after January 2001, and after the issuance of the plaintiff's notice dated 15 February 2001, the plaintiff failed to force-sell immediately.

However I note upon a perusal of the defence, that the defendant's case was merely that he did not receive the said notices. To my mind this is an important issue which the defendant ought to have pleaded since he has specified the relevant dates after which the plaintiff ought to have force-sold his shares. By merely denying receipt of the letters and subsequently at trial switching to an eventually different line of defence shows that the defendant has been hoist by one's own petard. It is trite law that a party is bound by his own pleadings. In *Malayan Banking Berhad v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; (as he then was) said at pp. 523-524 as follows:

> It is trite law that a party is bound by its pleadings, and that allegations of negligence must be pleaded with particularity. The so-called particulars of negligence pleaded were as follows:
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> (1) Selling the said property at RM56,000 on 21 September 1988;

(2) Failed to appoint qualified person to obtain the true commercial value of the property;

(3) Failed to do all that is prudent to determine the true commercial value of the said property or the status of the property market;

(4) Failed to notify the defendants of the sale of the said property at the said price of RM56,000 or at all.

Item (1) is not an averment of negligence. Item (3) is equally deficient because the borrowers did not specify what specific action the bank should have taken which would have been prudent, nor did they specify what the result would have been if such action had been taken.

I therefore held that by failing to plead such an act specifically the defendant ought not to be allowed to rely on such a defence at trial.

2nd Issue:

It was apparent that the defendant did not even know what the price of the share was in February 2001, and this was remarkable as the defendant was himself the managing director of the company Trans Capital Holdings Berhad since 1996 which shares were the charged security. Instead during the trial, the defendant tried to derive the price of the share by using the information contained in the plaintiff's letter dated 15 February 2001. Upon cross-examination, the defendant agreed that the figure he derived was wrong and that the correct values was actually much lower. In the end, the defendant's counsel informed the court that the defendant agreed that the price of the share as stated by him in his witness statement was wrong and that he was willing to agree that it was RM0.845 per share. In one instance, the defendant asserted that one lot of his share was worth RM1307.639 in February 2001, but subsequent to his agreeing that the price was RM0.845 per share, the figure was reduced to RM845 per lot of 1,000 shares; clearly a big difference.

I accept the plaintiff's submission that if it had been clear what the defendant's defence was regarding this issue, it would have been easy for the plaintiff's witness to have explained why there was no sale of shares in February 2001. According to the plaintiff's ledger of the defendant's account, the defendant continued to make payment up to 23 May 2001. On 23 May 2001, the defendant paid RM5,000. The plaintiff only issued the notice of demand on 2 July 2001 and force-selling began on 13 July 2001. Further PW1 a bank officer testified that the defendant failed to pay the April installment and that only RM5,000 was paid in May, instead of the agreed RM15,000, a shortfall of RM10,000. This evidence was not challenged. I therefore accept the plaintiff's explanation why there was no question of selling shares in February 2001.

a It is clear that on the facts the defendant's allegation of the alleged breach of the plaintiff's duty of care is not made out.

The Law

The law relating to the duty of care with regard to mortgaged property, in particular shares, is well settled. Firstly the relationship between the parties is b governed by contract. In this case the plaintiff's power of sale is governed by cl. 4.01 of the MOD dated 3 May 1999.

Clause 4.0 reads as follows:

> c Upon the happening of any of the following events, that is to say:
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> (a) if the Borrower shall fail to observe or perform or commit a breach of any of its agreements, covenant, stipulations, terms and conditions contained in this Memorandum and, if capable of remedy such breach immediately after notice by the Lender to do so;
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> d (b) If an Event of Default as set out in Article IX of the Facility Agreement shall occur;
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> then the Lender may without prejudice to any of its other rights and without any notice to the Borrower sell or dispose of the said shares or any part thereof either together or in parcels, either by dealings at any broker's board or by public e or private sale or in such other manner for such consideration (whether payable or deliverable immediately or by installments) as the Lender may think fit without being in any way responsible for any loss occasioned thereby whatsoever arising.

Clause 4.03 reads as follows:

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> The Borrower hereby agrees and authorises the Lender at any time during the subsistence of the security hereunder and without prior notice or concurrence of the Borrower to sell or dispose the said shares in the event the security value or the same shall fall below the security margin stipulated in Clause 6.01 hereof or upon the happening of any event which in the sole opinion of the Lender g may render the security herein in jeopardy.

Clause 15.01 reads as follows:

> The Borrower declares that the Lender, its servants, agents or assignees shall not be answerable or responsible for the loss of or damage to or diminution in h value of any of the said shares howsoever arising whilst the same are in the Lender's possession custody or control or that of the Lender's servants, agents, bankers or any assignee or transferee under this Memorandum whether by the exercise or non-exercise of any of the authorities or powers conferred upon the Lender hereunder.

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The effect of the power of sale conferred on the plaintiff, and expressly agreed to by the defendant gives the plaintiff wide powers to sell the shares as and when the plaintiff sees it fit to do so without being liable for losses should losses occur. In *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839 the Privy Council overturned a decision of the Hong Kong Court of Appeal, by allowing the bank's appeal and claim for summary judgment. In that case the appellant bank advanced to the debtor $HK30 million which was secured by way of mortgage on shares in a company and a deed of guarantee executed by the respondent. The debtor defaulted in payment of the loan. The mortgage contained 'the usual power of sale'. The surety claimed that he was not liable to pay anything to the creditor by reason of the following allegations which he offered to prove at trial. (1) The mortgaged shares were worth $HK60 million on the date of the mortgage 19 May 1982. (2) The shares were worth not less than $HK30 million on 18 November 1982 when the principal sum became due. (3) The shares had become worthless. (4) The creditor ought to have known of the declining value of the shares and should have sold them before they became worthless. Lord Templemen said at p. 841 as follows:

> But the surety claims that the creditor owed the surety a duty to exercise the power of sale conferred by the mortgage and in that case the liability of the surety under the guarantee would either have been eliminated or very much reduced. The Court of Appeal sought to find such a duty in the tort of negligence but the tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights.

At p. 842 his Lordship continued:

> In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgage securities to the surety. If the creditor chose to exercise his power of sale over the mortgage security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.

This passage of the Privy Council's decision was cited with approval by our Court of Appeal in *Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd* [1997] 3 CLJ 216 at p. 224. In *Cuckmere Brick Co Ltd and Another v. Mutual Finance Ltd* [1971] 2 All ER 633 the court held that the mortgagee is not a trustee of the power of sale and that once the power of sale has accrued he is entitled to exercise it for his own purposes and sell as and when he chooses to do so.

It is my judgment that the plaintiff could sell whenever it chose to do so, upon default, provided that when it did sell it must obtain the true market value. For example if force selling took place on 13 July 2001 when the market price was RM0.305, the plaintiff must obtain RM0.305 for the share. In support of this I refer to the statement of Mahadev Shankar JCA who in turn referred to the statements of Edgar Joseph Jr J in *MBB v. Lim Poh Ho* [1997] 2 CLJ 516 at p. 532:

> To reinforce what was said by Edgar Joseph Jr J in *Asia Commercial Finance (M) Bhd* at p. 517 of his decision on the need to prove that the under value was so gross as to indicate fraud or want of proper standards of care, I would with respect adopt the remarks by Mr. Peter Butt at p. 181 of his article. It reads:
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> > On the other hand, it is also beyond doubt that a mortgagee may not exercise the power of sale in a fraudulent manner. It has been said that the price realised may be so low as to be in itself evidence of fraud on the part of the mortgagee, but it is clear from the decided cases that the quantum realised, although relevant, will not normally be conclusive. It is only an exceptionally low price which, per se, conclusively demonstrates fraud (as, for example, where a property worth $1,600 was sold for twenty-five cents, one worth $5,500 was sold for $50, and one worth between $13,000 and $19,000 was sold for $1,000). Generally, inadequacy of price will need to be coupled with other factors, such as inadequate marketing or knowledge, that another buyer may be prepared to pay a better price, before the sale will be set aside. In any case, the value of real estate is largely a matter of opinion, and it is to be expected that the mortgagor may have an inflated idea of its worth, while the buyer naturally takes a conservative view of the value of what he is buying.

In this case the plaintiff sold the shares at market value. There is no evidence or allegation that the market value was not obtained at the time of the sale of shares. I therefore find that there is no breach of duty of care or negligence on the part of the plaintiff in selling the charged shares.

3rd Issue: KLSE Rules

In his defence, the defendant alleged that the plaintiff had breached its duty of care by failing to follow mandatory Rules of the Kuala Lumpur Stock Exchange. At the trial, the defendant called Murugappan a/l Manickam (DW2) a remisier. DW2 referred to the KLSE rules. However under cross-examination DW2 correctly informed the court that the rules mentioned were no longer in force, and that in any case the plaintiff was not bound by the KLSE rules. This ground therefore does not constitute a defence to the plaintiff's claim.

I therefore grant the plaintiff an order in terms of prayers (a) & (b) of his claim. As for prayer (c) I cannot understand why the plaintiff is praying for solicitor/client costs. In any case this issue was not even canvassed before me.

I therefore make the usual order of party and party costs.